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September 14, 2017

VIA ELECTRONIC MAIL

Jeff S. Jordan
Complaints Examination and Legal Administration
Federal Election Commission
999 E Street, NW
Washington, DC 22210

Re: MUR 7002 – Response of Heidi Cruz

Dear Mr. Jordan:

Through counsel, Heidi Cruz provides the following response to the complaint filed by Campaign Legal Center and designated by the Commission as MUR 7002.

I. BACKGROUND

The complaint in MUR 7002 involves the same factual background as MURs 7001, 7003, and 7009, as well as the Commission's own audit findings that were finalized and approved by the Commission on May 25, 2017. During the Commission's audit of Ted Cruz for Senate (the "Committee"), the Audit Division and Office of General Counsel considered whether Mrs. Cruz made an excessive contribution to the Committee because Senator Cruz borrowed funds from Goldman Sachs using the value of a margin account owned jointly with Mrs. Cruz. Ultimately, the Commission did not adopt a finding that Mrs. Cruz made an excessive contribution to the Committee.

II. ANALYSIS

1. Established interpretation and prior administration of the Federal Election Campaign Act require the Commission to find no violation.

The U.S. Supreme Court has long recognized the Constitution's protection of a candidate's ability to expend their own resources in support of their election to federal office. *See Buckley v. Valeo*, 424 U.S. 1, 54 (1976) ("[T]he First Amendment simply cannot tolerate [FECA]'s restriction upon the freedom of a candidate to speak without legislative limit on behalf of his own candidacy."). The Commission has codified this constitutional guarantee at 11 C.F.R. § 110.11. Under this provision, a candidate's contributions from their own personal funds in support of their campaign are not subject to limitation. *Id.* The Federal Election

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Campaign Act of 1971, as amended (the "Act"), and its implementing regulations further supplement this provision by clarifying the assets a candidate may consider "personal funds" within the meaning of 11 C.F.R. § 110.11. *See* 52 U.S.C. § 30101; *see also* 11 C.F.R. § 100.33.

The definition of "personal funds" codified by the Commission clarifies that a candidate may make unlimited contributions of assets that the candidate had legal rights of control over at the time the individual became a candidate. 11 C.F.R. § 100.33(a). It is not enough for the candidate to merely have possession of an asset; the regulations dictate that the candidate be able to demonstrate the existence of the candidate's legal or equitable title to the asset. *See* 11 C.F.R. § 100.33(1)-(2). The Commission anticipated jointly owned property by explaining that a candidate's personal funds include the candidate's share in a jointly owned asset, with a presumption of one-half share value of an asset owned jointly where the share value is not dictated by the instrument of ownership. *See* 11 C.F.R. § 100.33(c)(1)-(2).

The definitions encapsulated by 11 C.F.R. § 100.33 mandate that both the candidate and the Commission rely on the state law governing the asset when determining whether that asset is contributed from the personal funds of a candidate. 11 C.F.R. § 100.33(a). The Commission has routinely applied this principle that state law should govern the attributes of an asset to supplement the current regulatory framework. In AO 2013-16, the Commission noted that state law is consistently considered to supply the meaning for terms not defined at law. Specifically, the term "spouse" contained in 11 C.F.R. § 100.33 was defined subject to the applicable state law. AO 2013-16 (DCCC). The Commission has also used state law to substantively determine asset questions related to the existence of legal entities, debts, and asset values. *See generally* AO 1995-07 (Holland & Knight); AO 1995-07 (Key Bank of Alaska).

During the audit process, Commission staff noted that the assets supplied as collateral for the margin loan were owned jointly by Senator Cruz and Mrs. Cruz but without an enumerated ownership interest. Therefore, in the Final Audit Report, the Commission incorrectly assumed this collateral should be subject to the automatic half-share value provisions enumerated in 11 C.F.R. § 100.33(c)(1)-(2). *See Final Audit Report of the Commission on Ted Cruz for Senate*, p. 8 (June 22, 2017) ("Only $366,000 appears to have come from the Candidate's personal funds."). To the contrary, the Commission should recognize that its previous reliance on state law for dictating the terms of a specific asset is instructive in the present matter, and that analysis mandates the conclusion that *all* assets used to collateralize the margin loan were in fact the personal property of Senator Cruz.

A. *Texas law governs the joint account in this matter.*

The Commission has recognized the specific issue of candidate property jointly held by the candidate and the candidate's spouse. To clarify the treatment of these assets, the Commission directs that an asset should be governed by any instrument of conveyance or ownership attached to that asset. *See* 11 C.F.R. § 100.33(c)(1)-(2). The Commission has further defined this rule in the context of jointly held accounts through its own

administrative process. The Commission's guidance deems all funds held in joint accounts to be the candidate's personal funds when the state law governing the account grants full ownership and access to the candidate. *See Addendum to Legal Analysis on Proposed Interim Audit Report on Friends for Menor* (LRA 732) (July 2, 2008). When a state's laws give full control to both parties of a jointly held account, the state law acts as the instrument of conveyance or ownership required by 11 C.F.R. § 100.33(c) and the Commission's presumption of equal shares of ownership is not implicated. *Id.* The Commission has routinely applied this test when considering matters under review and audit reports. *See* MUR 2292; *see also OGC Comments on Bauer for President 2000, Inc.* (LRA 543).

The Commission acknowledges that the joint account containing the collateral is governed by the laws of Texas as an account held by joint tenants with right of survivorship. *See Comments on the Draft Final Audit Report - Ted Cruz for Senate* (LRA 976) (January 10, 2017) at 6. The Commission concedes that Texas law defines joint accounts as payable upon request of the parties. *Id.* Therefore, the state law governing the joint account in this matter is subject to application of the Commission's rule regarding joint accounts and the entirety of assets contained in this account are the personal property of the candidate as defined by 11 C.F.R. § 100.33.

B. *The collateral was the community property of the candidate under the laws of Texas and the complete personal property of the candidate.*

Texas is one of a handful of states that treat all property acquired during a marriage as "community property." Tex. Fam. Code Ann. § 3.002. Community property is defined negatively as all property that is not the separate property of the individuals in the marriage, creating a rebuttable presumption that property acquired during a marriage is the community property of both spouses. *See Young v. Young*, 168 S.W.3d 276, 281 (Tex. App. 2005) (establishing a separate property requires clear and convincing evidence). This presumption is strongly adhered to by Texas courts and difficult to overcome. *See Levesque v. Levesque*, No. 04-05-00146-CV, 2006 WL 47044, at 1 (Tex. App. Jan. 11, 2006) (evidence of asset purchase with separate funds alone is insufficient to establish separate property). Texas courts have explained that the distinction between separate and community property is a state constitutional question and forms of property may not be transformed by legislative enactment. *See Eggemeyer v. Eggemeyer*, 554 S.W.2d 137, 140 (Tex. 1977) ("This court has also held that the legislature cannot transform one type of constitutionally defined property into another type of property.")

Therefore, absent any evidence rebutting the Texas presumption of community property, the assets at issue in this case must be viewed as community property by the Commission. Community property in Texas is not subject to automatic rules of ownership and division. Instead, Texas courts view community property subject to common law rules of equity. *Winkle v. Winkle*, 951 S.W.2d 80, 90 (Tex. App. 1997) (Explaining that there is no requirement that community property be divided equally). Instead of a bright-line rule of ownership, asset ownership at dissolution of a marriage has been held to be subject to

consideration of all factors a court deems necessary to achieve an equitable result and the court's judgment will only be disturbed by a showing of clear abuse of discretion. *King v. King*, 661 S.W.2d 252, 254 (Tex. App. 1983).

Senator Cruz and Mrs. Cruz were married when the assets used to collateralize the margin loan were acquired, and they were married when the margin loan was obtained. Therefore, the assets in question were and remain subject to the rules of equitable ownership established by the courts of Texas. The present assets have not been divided by a court subject to the rules of Texas community property, and they remain the personal funds of Senator Cruz because he maintains legal and equitable title to the assets. The Commission cannot maintain its assumption that the collateral should be subject to the automatic half-share value provisions in 11 C.F.R. § 100.33(a)(1)-(2), as the Commission's own regulations mandate that the Commission rely on the Texas interpretation of these assets. 11 C.F.R. § 100.33(a). Senator Cruz used entirely personal funds for the collateral in question in this matter; therefore, no excessive contribution was made by Mrs. Cruz.

2. All funds secured by commercial loan were repaid within 60 days, a situation the Commission considers analogous to the procedures outlined in 11 C.F.R. § 103.3(b)(3).

Even if the Commission were to determine that the assets used to collateralize the margin loan were not the community property of Senator Cruz, the Commission's Audit Division and Office of Legal Counsel previously addressed the facts presented by this MUR and already found that no violation occurred. Specifically, these facts were reviewed by the Commission through the lens of 11 C.F.R. § 103.3(b)(3), which governs the receipt of excessive contributions by the treasurer of a candidate's campaign committee. Under this provision, a campaign's treasurer is afforded a period of not more than 60 days to return an excessive contribution that cannot be otherwise re-designated or attributed. *Id.*

Applying this provision to the facts presented, the Office of Legal Counsel concluded that there was only one instance where an excessive contribution may have resulted based on application of 11 C.F.R. § 100.33(c) to the collateral held jointly by Senator Cruz and Mrs. Cruz. In that instance, however, the loan secured as a result of that portion of the collateral, which allegedly may have triggered an excessive contribution, was repaid by the Committee within 60 days. Therefore, the Office of Legal Counsel concluded that no violation could have occurred because the Committee took the appropriate action analogous to the procedures mandated by 11 C.F.R. § 103.3(b)(3). *See generally OGC Supplemental Comments on the Resubmitted Draft Final Audit Report – Ted Cruz for Senate* (LRA 976) (February 24, 2017) at 2-3.

III. CONCLUSION

The assets used to collateralize the margin loan at issue in this MUR were at all times, and remain, the personal property of Senator Cruz within the meaning of 11 C.F.R. § 100.33;

however, even if the Commission were to avoid consideration of the ownership question or conclude otherwise, the Commission must find that Mrs. Cruz did not make an excessive contribution because the Committee repaid the funds within 60 days in accordance with 11 C.F.R. § 103.3(b)(3).

For the foregoing reasons, I respectfully request the Commission to find that no violation occurred and promptly close this matter as it relates to Mrs. Cruz. If you require additional information, or if I can be of any assistance, then I can be reached at (512) 354-1787.

Sincerely,

Chris K. Gober
Counsel, Heidi Cruz